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**STATE OF MARYLAND**  
**PUBLIC INFORMATION ACT COMPLIANCE BOARD**

**PIACB 22-09**

**March 21, 2022**

**Ocean City Police Department, Custodian**  
**Steve Thompson, Washington Post, Complainant**

In November of 2021, the complainant, Steve Thompson, sent a Public Information Act (“PIA”) request to the Ocean City Police Department (“OCPD”) seeking a copy of the internal affairs file of one particular police officer. The OCPD ultimately charged a fee of \$692.27 for 30 pages of records, most of which contained redactions. The complainant alleges that this fee is unreasonable. As explained further below, we conclude that a portion of the fee is unreasonable and order that it be reduced by \$66.73.

**Background**

In a PIA request sent on November 24, 2021, the complainant asked the OCPD for the internal affairs file of a police officer who, as internal affairs officials determined in 2015, had led a criminal investigation while under the influence of alcohol. The complainant requested the full file, including all audio and video evidence. The OCPD sent the complainant a letter on December 7, 2021, advising him that it expected that it would take approximately 48 hours, and cost between \$2,500 and \$3,000, to fulfill his request. The OCPD also denied the complainant’s request for a waiver of the fee. The estimate included copying costs of 25 cents per page (for approximately 350 pages) and media costs of \$15 for a USB drive, but did not include the cost for attorney review or redaction of non-paper records. The OCPD asked the complainant for a \$1,750 deposit.

In an effort to narrow his request, the complainant asked for an index of the file, which the OCPD provided on December 14, 2021. The index revealed that the file consisted of fifteen separate tabs. The complainant then requested copies of the records from six of those tabs, and the OCPD revised its fee estimate to between \$500 and \$600, not including the cost of attorney review (billed at \$175 per hour) and the time needed to redact any non-paper records. The OCPD also advised that the two hours of free labor it was required to provide had already been expended.<sup>1</sup> On December 21, 2021, the complainant narrowed his request again and asked for the records from two tabs of the file—those containing records related to the “Investigation / Finding /

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<sup>1</sup> “The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.” Md. Code Ann., Gen. Provisions § 4-206(c).

Recommendation,” and the “Completion of Discipline Personnel Order.” The OCPD reduced the fee estimate to \$280 to \$350, not including attorney review costs. At the OCPD’s request, the complainant sent a \$250 deposit and the OCPD began the work of fulfilling the complainant’s PIA request.

On February 3, 2022, the OCPD sent the responsive records and an invoice for a remaining balance of \$442.27, which brought the total fee to \$692.27. Of the 30 pages of responsive records, 27 contained redactions. On the invoice attached to the records, the OCPD provided a breakdown of the costs. It indicated that it took 15 minutes to locate and review the file, approximately 10 minutes to “locate, pull, review” the index to the file, and 1.5 hours for “copying for production and redaction.” The invoice also indicated that staff had spent 4 hours (3.92 of which were charged) redacting the records (for a total of \$247.27) and that an attorney had spent 2.5 hours reviewing the redacted records (for a total of \$437.50). In addition, the complainant was charged copying costs of \$7.50.

The complainant filed his complaint the next day, on February 4, 2022. He alleges that the \$692.27 fee is unreasonable for several reasons. First, he contends that the “appropriate redactions . . . could have been done in far less time.” The complainant explains that he read each of the 27 redacted pages aloud, “clearly and deliberately,” and that this took him a total of four minutes per page, and not the nearly nine minutes per page that the OCPD’s 3.92 hours<sup>2</sup> amounts to. Second, the complainant takes issue with the amount of time—two hours—that the OCPD claims it took to locate the relevant file and copy the 30 pages worth of responsive records. Third, the complainant argues that the OCPD should not have charged for its attorney to review the records because the review was akin to the type of duplicative, secondary review that the Board has found unreasonable in past matters.

The OCPD, through counsel, responded to the fee complaint on February 22, 2022. It explains that, in reviewing the invoice provided to the complainant, the OCPD realized that it had “mis-ordered” the work performed and that, as a result, the OCPD has revised its fee to \$653.41. In a worksheet attached to its response, the OCPD provides more detail about the tasks performed and the rates charged for its response to the complainant’s PIA request. The OCPD states that it took a Lieutenant .42 hours (or approximately 25 minutes) to retrieve the keys for the file room, go to the file room, locate the filing cabinet, locate the file within the filing cabinet, return to the office with the file, locate the requested portions of the file, determine if the file contained other media than paper, provide the file to the captain, and return the file to the secure file room. That .42 hours was charged at a rate of \$52.90 per hour and provided free of charge. Next, the OCPD asserts that it took the Captain four hours (billed at \$63.08 per hour) to review the scanned records, highlight the text to be redacted, print the documents, scan the documents as a PDF, meet with the records technician to discuss redaction, receive the redacted records from the technician, and scan and send the redacted records to the attorney to review. Of those four hours, 1.58 hours were provided at no cost, *see supra*, note 1. The OCPD claims that it took the records technician three hours to use a pen and white out to redact information that the Captain highlighted. Finally, the

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<sup>2</sup> As noted above, the invoice appears to indicate that it took four hours to redact the records, but that only 3.92 of those hours were actually billed.

OCPD advises it took its attorney 2.5 hours to review the responsive records for “legal compliance/assessment of material to be withheld/redacted.” The OCPD charged attorney time at \$175 per hour.

The OCPD asserts that none of the work performed was duplicative and, regarding the amount of time it took to make redactions, that “[u]nfortunately . . . this is how long it took the staff to do the work.” In fact, the OCPD believes that it spent far more time responding to the complainant’s PIA request than was actually billed. As to the amount of time it took to locate the file, the OCPD suggests that “in large police departments it would take significantly longer to locate a record than it took the Lieutenant in this instance.” Lastly, the OCPD strenuously disputes the complainant’s allegation that it was unreasonable for the OCPD to charge him for the time it took its attorney to review the responsive records. The OCPD stresses that the PIA request was submitted shortly after a significant change in the law regarding internal affairs records,<sup>3</sup> which were previously considered non-disclosable personnel records.<sup>4</sup> Given that change, and the sensitive nature of the records at issue, the OCPD contends that it was not unreasonable to have an attorney review the record and the redacted version of the record to “ensure not only that information that should be redacted has been redacted, but also that information that should not be legally redacted is provided.”

### Analysis

We are authorized to review and resolve complaints that allege that a records custodian has charged an unreasonable fee higher than \$350 to respond to a request for public records. § 4-1A-05(a).<sup>5</sup> A “reasonable fee” is one that is reasonably related to “the recovery of actual costs” that a unit of State or local government incurs when it responds to a PIA request. § 4-206(a)(3). Reasonable fees may include “the actual costs of the search for, preparation of, and reproduction of a public record”—including media and copying costs—as well as the cost of staff and attorney review, which must be “prorated for each individual’s salary and actual time attributable to the search for and preparation of a public record.” § 4-206(b). Ordinarily, public records should be provided with the “least cost and least delay,” § 4-103(b), and a custodian generally should not charge for duplication of effort—e.g., for multiple reviews of the same record, *see* PIACB 21-13 at 5 (June 3, 2021); PIACB 16-05 at 3 (June 1, 2016). If we conclude that a custodian has charged an unreasonable fee as the PIA defines it, we are to “order the custodian to reduce the fee to an amount determined by the Board to be reasonable and refund the difference.” § 4-1A-04(a)(3). We will address each of the complainant’s allegations in turn, though in a slightly different order.

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<sup>3</sup> *See* 2021 Md. Laws, ch. 62.

<sup>4</sup> *See Maryland Dep’t of State Police v. Dashiell*, 443 Md. 435 (2015). As of October 1, 2021, records of police misconduct (except those that relate to “technical infractions”) are no longer classified as personnel records and are instead subject to the PIA’s discretionary exemption for investigative records. *See* Md. Code Ann., Gen. Provisions § 4-311 (personnel records), § 4-351 (investigatory records).

<sup>5</sup> Statutory references are to the General Provisions Article of Maryland’s Annotated Code, unless otherwise indicated.

A. Search Time

The complainant questions, based on the invoice provided to him with the responsive records, whether it could have or should have taken the OCPD two hours to locate the relevant file and copy the records from two of its tabs. We note that the invoice bills .25 hours to “locate, review” the file, .17 hours to “locate, pull, review” the index to the file, and 1.5 hours for “copying for production and redacting.” A separate 3.92 hours is billed for “redacting document.” Thus, based on the invoice alone, it does appear that the OCPD indeed took nearly two hours to simply locate one file and copy thirty pages of records from it, an amount of time that, on its face, appears excessive. However, the worksheet provided by the OCPD in its response to the fee complaint seems to clarify, to some degree, that the amount of search time was .42 hours (or about 25 minutes), and that two separate employees actually performed redaction-related tasks. In other words, the 1.5 hours charged on the invoice for “copying for production and redacting” actually included time spent actively redacting the records, and not simply copying the records so that they *could be* redacted.

With this clarification, the OCPD maintains that it actually took a Lieutenant approximately 25 minutes to go to the file room, find the relevant file, remove the responsive records from two sections of the file, provide those records to the Captain, and return the file to the file room. The OCPD posits that it would take large police departments “significantly longer” to locate similar records. In a reply to the OCPD’s response, the complainant provided a response from the Maryland State Police (“MSP”) to a similar PIA request and noted that MSP, which is “among Maryland’s largest departments,” produced the 22-page response at no cost “presumably because they were able to locate the file, review it, and make appropriate redactions in fewer than two hours.” While we share the complainant’s concern over the disparity between the cost of the OCPD’s response and that of MSP’s, we cannot necessarily find that it flows solely or conclusively from a violation of the PIA’s fee provisions. Rather, the difference might be validly attributed to a difference in resources and training, for instance, or in the nature of the specific internal affairs records involved in each case. We do stress, however, that units of State and local government have an obligation to establish and maintain “an active and continuous program for the economical and efficient management of records,” part of which is ensuring that agency records are “covered by a schedule, which shall outline procedures to ensure the retention and usability throughout the authorized lifecycle of the records.” COMAR 14.18.02.05A. Giving due attention to these important obligations will help an agency comply with its duty under the PIA to provide disclosable public records with “the least cost and least delay.” § 4-103(b).

Based on the information before us, we cannot conclude that it was unreasonable for the OCPD to spend approximately 25 minutes searching for the requested records in this case.

B. Redaction Time

The complainant also alleges, again based on the figures and explanations provided in the invoice, that it was unreasonable for the OCPD to spend nearly four hours redacting 27 of the 30 pages of responsive records. As with the allegation related to search time, the OCPD’s response suggests that the amount of time was actually different. Rather than the nearly four hours of

redaction time indicated by the invoice, the worksheet attached to the OCPD's response seems to indicate that the OCPD spent close to *seven* hours, between two different employees, redacting the records. This figure strains imagination. While it might reasonably have taken the Captain four hours to review the 30 pages of records, make judgments about and highlight the text to be redacted, and meet with the clerk to discuss the redaction process—and even this amount of time seems to us a bit excessive, given the records ultimately produced—it is hard to understand how it could have taken the clerk three hours to marker over the highlighted text and then apply white out to the redactions to ensure that the text could not be read. Further, the OCPD's response does not explain why the invoice reflects a time expenditure of 1.5 hours related to the clerk's redaction duties if the clerk actually spent three hours performing these tasks. Instead, the OCPD simply asserts that the clerk spent three hours on the response, but that the invoice only included 1.5 hours. The OCPD indicates that “if the Board believes we should only be able to recover 1.5 hours as that is what was on the invoice, we understand.”

We indeed believe that the OCPD should bill only the 1.5 hours of clerk redaction time originally indicated on its invoice. First, it seems to us that this is only the fair way to proceed. *Cf.* PIACB 19-06 at 3 n.4 (Nov. 27, 2018) (“[W]e do not believe it is fair . . . to allow [a] custodian to ‘make up’ for an overcharge in one category by claiming, after the fact, that it undercharged by an equal or greater amount in another category. The basis for a fee, and any adjustments between the estimated and actual costs, should be made clear to the requestor at the time the fee is finalized[.]”). Second, in our view, 1.5 hours seems a far more reasonable amount of time to complete the redaction tasks performed by the clerk as the OCPD describes them in its response. We emphasize the need for agencies to track the *actual* time each employee spends working on a PIA response. *See* § 4-206(b)(2) (staff costs included in calculation of actual costs must be prorated for each individual's salary and “*actual time* attributable to the search for and preparation of a public record,” (emphasis added)). So, if an employee is called away to answer a phone call, for example, or to perform other duties amid work on a response to a PIA request, that time should not be included in the calculation of the fee charged to the requester. *See, e.g.,* PIACB 19-14 at 3 (Aug. 19, 2019) (school board could charge only for time that staff was “actively engaged in the search for records,” and not, e.g., for time when electronic records were downloading or uploading, when “staff were free to undertake duties unrelated to the PIA response”).

Though not without reservation, we find that it was reasonable for the OCPD to charge the time it charged for the work performed by the Captain. We do not, however, find it reasonable for the OCPD to assess costs for three hours of clerk time spent redacting the records as directed by the Captain. Rather, we find that the 1.5 hours originally billed was more reasonable. We will therefore reduce the fee accordingly.

### C. Attorney Review Time

Finally, the complainant alleges that the fee the OCPD charged is unreasonable because it includes costs for 2.5 hours of attorney review time. The complainant points out that we have, in the past, found it unreasonable to charge for attorney review time in certain circumstances. The OCPD counters that the attorney's review was necessary and did not constitute duplicative effort in this case, and urges the Board to find it reasonable.

The PIA clearly contemplates that attorney review time in particular may be included as a cost that is reasonably related to the actual costs of responding to a PIA request. *See* § 4-206(a)(3) and (b)(2). To the extent that any of our prior opinions might be read to suggest that *all* attorney review is duplicative in nature, and therefore unreasonable, we now clarify our view that this is not the case. Several of our more recent opinions can be distinguished from the matter here. First, in PIACB 21-12 at 6-7 (May 27, 2021), we concluded that a portion of the fee attributed to attorney review time was unreasonable because the collection of records sent to the attorney for review included numerous duplicates and non-responsive records. Thus, there the attorney—who was paid at an hourly rate that was 13 times that of the clerk—was engaging in duplicative and unnecessary work. *See also* PIACB 21-15 at 6 (July 6, 2021) (explaining that an agency should “use its staff time to perform the bulk of the review and send only those responsive records that genuinely present a question of whether or not an exemption applies to its attorney for legal review”). Then, in PIACB 21-13 at 4-5 (June 3, 2021), we found it unreasonable to charge the requester for two hours of review time by General Counsel when the response had been prepared by an Associate General Counsel—i.e., another lawyer. On the specific facts of that case, it appeared to us that General Counsel was performing work that was more supervisory in nature, or more related to oversight as opposed to responding to the PIA request. Finally, in PIACB 22-06 at 8 (Jan. 18, 2022), we concluded that it was unreasonable for a sheriff’s office to include in the fee estimate charged ten hours of time for executive staff to review the response prepared by lower-level staff. There were several unique facts in that case that led us to that conclusion. First, the PIA request sought only the names of police officers, and not records that would require review for redactions. *Id.* Second, the employees preparing the response and determining which officers’ names could be disclosed were specialized staff who were very familiar with the type of records at issue. *Id.* at 3. Lastly, the sheriff’s office itself characterized the records to be reviewed a second time as “fully vetted cases,” and indicated that the review was to ensure compliance with both office policy and the law. *Id.* at 8.

All of the cases cited above differ from the situation here. The OCPD’s 30-page response does not contain duplicative or non-responsive records. The lawyer was not reviewing a junior lawyer’s work. Rather, it appears that the Captain who made the initial redactions was seeking counsel’s opinion as to whether they were appropriately made. And, there is a qualitative difference in the records sought here as opposed to those sought in PIACB 22-06—i.e., actual documents containing substantive information as opposed to only the names of the officers associated with the records. We cannot say, based on the records produced, that these documents did not present a “genuine question” as to whether or not they should have been disclosed in the form that the Captain was proposing. This is especially so, as the OCPD notes in its response, given the recent change to the law and the potentially sensitive nature of the records involved. In light of the specific facts and circumstances presented here, we conclude that it was reasonable for the OCPD to charge the complainant for 2.5 hours of attorney review time.

Our conclusion notwithstanding, we stress again that—especially when it comes to voluminous responses—custodians should seek attorney review of only those records that present a genuine legal question as to whether an exemption applies or a redaction should be made. As we recently said, “[t]his is so to minimize the amount of time necessary for review by an attorney that is often compensated at a much higher rate of pay, and to avoid duplication of effort.” PIACB 22-08 at 3 n.6 (Mar. 23, 2022). We expect as law enforcement agencies in particular gain more

experience applying the new law regarding disclosure of records related to police misconduct, and as staff are better trained on preparing responses to requests seeking these records, the amount of time needed for attorney review will diminish.

### **Conclusion**

We conclude that the costs for search and attorney review time included in the OCPD's fee are not unreasonable. And, we find that the \$7.50 of copying costs charged are reasonable. We further conclude, however, that it is unreasonable for the OCPD to charge the complainant for three hours, rather than 1.5 hours, of clerk time spent redacting the responsive records. In light of these conclusions, and the fee adjustments already made as indicated in the OCPD's response to the fee complaint, we determine that a reasonable fee is as follows. For search time, .42 hours at the Lieutenant's hourly rate of \$52.90, provided at no cost per § 4-206(c). For review and redaction time, four hours (1.58 hours of which are provided at no cost per § 4-206(c)) at the Captain's hourly rate of \$63.08, resulting in a total of \$152.65. For redaction by the records clerk, 1.5 hours at an hourly rate of \$18.5967, for a total of \$27.89. And, for attorney review, 2.5 hours at \$175 per hour, for a total of 437.50. The full total then, including copying costs, is \$625.54. We therefore order that the OCPD reduce its fee to this amount. Understanding that the complainant has already paid \$250, this would leave a remaining balance of \$375.54.

#### **Public Information Act Compliance Board\***

*John H. West, III, Esq., Chair*

*Christopher Eddings*

*Deborah Moore-Carter*

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\* Board member Michele L. Cohen, Esq. did not participate in the preparation or issuance of this opinion.